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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1869.

ELI LILLY AND COMPANY,

Petitioner,

v.

SMITHKLINE CORPORATION,

Respondent.

RESPONDENT'S REPLY TO PETITIONER'S REPLY MEMORANDUM.

Of Counsel:
WILLIAM S. RAWLS,
AARON J. BEYER,
BALLARD, SPAHR, ANDREWS & INGERSOLL.

FREDERIC L. BALLARD,
30 South Seventeenth Street,
Philadelphia, PA 19103
Attorney for Respondent SmithKline Corporation.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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We file this reply in response only to petitioner's charge that certain assertions in our brief were "false and misleading" (Memorandum, at page 2). The assertions were that Lilly's Revised CSP was unique and unprecedented and would flagrantly violate the Robinson-Patman Act were it not for the exemption covering sales to non-profit hospitals. Lilly says this proposition was "neither raised, briefed, argued or decided below". What Lilly says is not true.

1. The District Court found that the Revised CSP was "a new marketing technique never before used by Lilly or any of its competitors" (69a, FF112) and was "a radical departure from the volume rebate scheme" previously used by Lilly and SmithKline (109a and n. 28). The District Court also noted the Robinson-Patman Act exemption (30a, n. 7).

2. Our post-trial memorandum to the District Court said (in a footnote at page 2):

> "Both the CSP and the RCSP would violate the Robinson-Patman Act if applied to any class of purchasers other than non-profit hospitals."

3. Our brief to the Court of Appeals said (at pages 36 and 37):

> "There is no precedent for the Revised CSP. Lilly could not point to any in the hospital market, and such a device would be unthinkable in any other market because it would be a flagrant violation of the Robinson-Patman Act."

The conclusion that the Revised CSP would violate the Robinson-Patman Act in any non-exempt market is obvious, and Lilly has never denied it. In view of the foregoing references, neither Lilly nor its lawyers can now plead surprise, and their characterization of statements concerning Robinson-Patman violations as "false and misleading" is incorrect.

Respectfully submitted,

FREDERIC L. BALLARD,
30 South Seventeenth Street,
Philadelphia, PA 19103
Attorney for Respondent,
SmithKline Corporation.

Of Counsel:

WILLIAM S. RAWLS,
AARON J. BEYER,
BALLARD, SPAHR, ANDREWS & INGERSOLL.